STATEMENT OF PRESERVATION OF ISSUES

The matter was timely appealed from a Decision before District Justice Nesbitt and scheduled for a trial De Novo on November 12, 2003 before the Honorable Albert R. Subers. Prior to trial, Defendant filed a Motion to Suppress. The Suppression Motion was denied as untimely for not being filed within thirty (30) days of taking the Appeal from the summary conviction.

Following two days of testimony, the Court heard argument on the third day and found the Defendant guilty, ordered her to pay restitution in the amount of $45,600.00 and forfeited all of her pets to the Montgomery County SPCA necessitating the instant appeal. The Defendant filed her appeal which was heard and decided by the Pennsylvania Superior Court on October 29, 2004. Application for Rehearing and Reargument was denied on December 29, 2005. A Petition for Allocatur was filed and denied by the Pennsylvania Supreme Court on June 2, 2005. The Defendant raised the issues contained herein at every stage of the proceedings.

ARGUMENT

I. THE DEFENDANT WAS DENIED HER RIGHT TO CONTE^T THE UNREASONABLE SEARCH AND SEIZURE SHE WAS SUBJECTED TO IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

The Fourth Amendment of the Constitution of the United States and Article I, Section 8 of the Pennsylvania Constitution provides individuals with protection against unreasonable searches and seizures. U.S.C.A. Const. Amend. IV. The ability to challenge the validity of the action taken in a search and seizure is through a Motion to Suppress in accordance with the Pennsylvania Rules of Criminal Procedure. Pa. R.CR.P. 578.

A Suppression hearing is then held by the Court who makes a determination as to whether an individual's constitutional rights have been violated. Pa. R.CR.P. 581(e). In the event a determination is made that the evidence obtained as a result of an illegal search and seizure was in violation of the individual's Constitutional rights, then the Court is required to suppress that evidence. Pa. R.CR.P. 581, Commonwealth v. Germann, 621 A.2d 589, 423 Pa. Super. 393 (1993); Commonwealth v. Sadvari, 723 A.2d 1044 (Pa. Super. (1998), appeal granted, 740 A.2d 1146, 559 Pa. 716, and revised 752 A.2d 393, 561 Pa. 588 (2000).

Pursuant to a search warrant issued on September 13, 2002, Janet Jones' entire home and property were searched and all of her pets were seized. Following the search and seizure, citations were issued which were contested by Janet Jones. She was convicted before a

district justice and timely appealed the conviction for a trial de novo in the Court of Common Pleas of Montgomery County.

The Pennsylvania Rules of Criminal Procedure provide for the filing of a Suppression Motion to contest the validity of searches and seizures pursuant to a search warrant. Pa. R.CR.P. 578. Those rules are applicable to appeals from summary convictions. Commonwealth v. Breslin, 732 A.2d 629 (Pa. Super. 1999)..

Generally, the time for filing a Motion to Suppress in accordance with the Pennsylvania Rules of Criminal Procedure is 30 days after arraignment in the Omnibus Pretrial Motion Pa. R.CR.P. 579. However, in appeals from summary convictions this thirty day limitation is not applicable since there is no arraignment. Commonwealth of PA Dept. of Environmental Resources v. Blosenski, 532 A.2d 497, 110 Pa. Cmwlth 194 (1987).

Janet Jones filed her Motion to Suppress prior to the commencement of her trial on November 12, 2003. The day preceding her trial was a court holiday. The trial court found that Janet Jones' Motion was untimely because it was not filed within thirty days of the appeal from her summary conviction. However, the Rule does not provide such limitations on the filing of a Suppression Motion on an appeal from a summary conviction. App. p.21 Opinion, J. Subers 2-9-04, p. 5. Pa. R.CR.P. 578,579

The Court also relied on the case of Commonwealth v. Barnyak, 432 Pa. Super. 483, 639 A.2d 40, *allocatur denied*, 515 US 1130 (1995). However, that reliance is clearly misplaced since that case did not involve a summary offense and no suppression motion was filed.

As seen from the Rules relied on by the Trial Court, there is no thirty day limitation on the filing of a

Suppression Motion for appeals from summary conviction. Consequently, the Judge's decision was clearly erroneous since it was contrary to the Pennsylvania Rules of Criminal Procedure as well as the holdings of both the Superior and Commonwealth appellate courts of Pennsylvania. Commonwealth of PA Dept. of Environmental Resources v. Blosenski, 532 A.2d 497, 110 Pa. Cmwlth 194 (1987); Commonwealth v. Breslin 732 A.2d 629 (Pa. Super. 1999).

Janet Jones appealed the trial court's decision to the Superior Court raising along with other issues, the issue of her denial of a suppression hearing in violation of her constitutional rights as well as the Pennsylvania Rules of Criminal Procedure. Pa. R. CR. P. 581 (e) Although the Superior Court did not adopt the decision of the trial court with respect to the necessity that a suppression motion be filed within thirty days of the taking of an appeal from a summary conviction, they affirmed the trial court stating that a motion for a suppression hearing was required to be filed at some uncertain time prior to trial. App. p. 31 Sup. Ct. Opinion pp. 5. They premised this decision on the inability of the Commonwealth to prepare. This clearly ignores Pa. R.CR.P. 580 which permits the Court to delay trial pending the disposition of the Motion.

This, of course, raises the question as to whether the time intended by the Superior Court is a day, a week, a month or at some other time that the trial court determines at the time that you file your Motion for Suppression. The difficulty with such a rule is the obvious uncertainty and the high likelihood of varying interpretation and unequal justice.

In the extent that a determination was made that the filing of the Motion the day before a trial was timely in view of the court holiday on November 11, the

Defendant's Motion on the morning of her trial would in fact then be timely as well.

In addition to the difficulty in the utilization of the Rule as espoused by the Superior Court in its Decision, is the fact that the Superior Court is without authority to implement or enact Rules of Criminal Procedure since the Pennsylvania Constitution leaves that authority exclusively within the jurisdiction of the Pennsylvania Supreme Court. Pa. Const. art V,§10(c); Commonwealth v. Brown, 669 A.2d 984, 447 Pa. Super. 454 (1995), appeal granted 6678 A.2d 367, 544 Pa. 677, affirmed 708 A.2d 85, 550 Pa. 580; Douris v. Brown, 229 F. Supp. 391 (2002), citing Brown. As a result of the Superior Court's intrusion of the jurisdiction of the Pennsylvania Supreme Court in enacting Rules of Criminal Procedure, Janet Jones petitioned the Pennsylvania Supreme Court for Allocatur to address that issue, since the new Superior Court Rule deprived her of her constitutional right to be protected against unreasonable searches and seizures through a hearing on those issues as mandated by law. Pa. R. CR. P. 581(e)

In view of the fact that the Pennsylvania Supreme Court has elected not to review her Petition, Janet Jones is left with one last hope to obtain a review that will require the SPCA and the Courts to provide a proper procedure for the safeguarding of an individual from violations of their Constitutional rights to be free from unreasonable searches and seizures

II. THE COURT'S DECISION DEPRIVED DEFENDANT OF HER CONSTITUTIONAL RIGHT TO CONFRONT THE COMMONWEALTH'S WITNESSES IN ORDER TO SHOW THEIR BIAS IN THE COLLECTION AND PRESERVATION OF THE EVIDENCE.

The Pennsylvania Supreme Court also denied Defendant's request for Allocatur with respect to the Trial Court's denial of her Sixth Amendment right to confront the witnesses against her. U.S.C.A Const. Amend. VI.

The Superior Court in a single paragraph at page 6 of their Opinion, dismissed the Defendant's argument concerning the limitation of the Defendant's cross examination of the Commonwealth's witnesses. App. p.32. This Superior Court's determination was made based on the purported irrelevance of the cross examination as to the admissibility of the evidence.

However, Defendant's argument concerning the limitation of defense counsel's cross examination was not as to the admissibility of the evidence which should have been excluded on other grounds as set forth supra, but based upon the ability to show the bias of the investigating officers and the manner in which they processed the scene and gathered and preserved the evidence. Bias of witnesses is clearly relevant and admissible. Commonwealth v. Sullivan, 402 A.2d 1019, 485 Pa. 392 (1979); Commonwealth v. Hales, 119 A.2d 520, 384 Pa. 153 (1956). A deprivation of the Defendant's right to elicit that testimony denies her the right to confront the witnesses against her guaranteed under the Sixth Amendment of the Constitution as set forth by the United States Supreme Court in Davis v.

Alaska, 94 S. Ct. 1105, 415 U.S. 308, 39 L. Ed. 2d, 347 (1974).

The Trial Court not only limited defense counsel's cross examination of the Commonwealth witnesses with respect to the manner in which they failed to properly gather and preserve the evidence, but advised counsel that he would be able to offer that in Defendant's case-in-chief. R230A. However, the Trial Court thereafter precluded defense counsel from establishing those facts to demonstrate the bias of the Commonwealth's witnesses by limiting the testimony of the Defendant's expert. R400A-401a. Further the Court struck valid expert opinion testimony. R410A-411a. The record is replete with additional restrictions improperly imposed by the Trial Court which deprived Defendant of a fair trial and her constitutional rights to confront the witnesses presented against her requiring that the matter be remanded for a new trial.

CONCLUSION

Janet Jones requests that this Court grant Certiorari to review the manner in which she was denied her Constitutional rights and deprived of a fair trial. As Justice Stevens noted in an August 6, 2005 address to the American Bar Association in Chicago, judges and juries do not necessarily always get it right because of inherent natural biases that may allow emotion to overtake reason.

Although this was in the context of the death penalty, the same principle would apply where the offense charged is set forth in an egregious manner. It is for this reason that the Courts must protect the individual's constitutional rights to ensure that they receive a fair and impartial trial.

In this instance, the lower Courts have failed to do so and Janet Jones requests that this Court review the matter to determine that her Constitutional rights were abridged and that she is entitled to have the matter remanded for a new trial. This will ensure that the Courts and legislature of Pennsylvania implement and require the utilization of appropriate procedures by the SPCA in the search and seizure conducted in an individual's home.

Respectfully Submitted

SOMMAR TRACY & SOMMAR

By _____

Kevin J. Sommar
Attorney for Petitioner

APPENDIX

1. Opinion, Court of Common Pleas of Montgomery County No. 00129-03, Subers, S.J., dated February 9, 2004

2. Memorandum of Superior Court of Pennsylvania, 3772 EDA 2003, before Stevens, Klein, JJ., and McEwen P.J.E., dated October 29, 2004

3. Order of Superior Court of Pennsylvania, 3772 EDA 2003, Per Curiam, dated December 29, 2004

4. Order of Supreme Court of Pennsylvania, No. 78 MAL 2005, Amy K. Swartz, Appellate Court Clerk, dated June 2, 2005

5. U.S.C.A. Const. Amend. IV
   Amendment IV, Search and Seizure

6. U.S.C.A. Const. Amend. VI
   Amendment VI, Jury trials for crimes, and procedural rights

7. Pennsylvania Supreme Court. Pa. Const. art. V, §10(c)

8. Pennsylvania Rule of Criminal Procedure Rule 578. Omnibus Pretrial Motion for Relief

9. Pennsylvania Rule of Criminal Procedure Rule 579. Time for Omnibus Pretrial Motion and Service.

10. Pennsylvania Rule of Criminal Procedure Rule 580. Disposition of Pretrial Motions.

11. Pennsylvania Rule of Criminal Procedure Rule 581. Suppression of Evidence.

12. 18 Pa. C.S.A. §5511 Cruelty to Animals

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA:

v. :NO.00129-03

JANET JONES :

OPINION

SUBERS, S.J. February 9, 2004

On September 13, 2002 two humane society police officers from the Montgomery County Society for Prevention of Cruelty to animals visited the home of Janet Jones in Hatfield Township, Montgomery County, in response to a complaint. When they got within five to seven feet of the closed door of the house, they smelled a strong odor of cat urine. When the door was opened the smell doubled. The officers were admitted to the home by Ms. Jones, where the smell was overpowering. Blinds were drawn and the other windows were covered. The house was piled high with animal cages and crates. The officers noticed approximately twenty cats and seven dogs during that visit.

The officers left, and made sure that their shelter could receive the animals. One sought and obtained a warrant while the other waited. The officers entered with several shelter employees and local police officers. Over

the course of nine hours they removed ninety-six cats, nine dogs, several hamsters, rats and turtle.[1]

During the time in the house the officers observed litter boxes, walls and kitchen counters covered with animal feces. Walls were streaked with urine. There were dead animals in bags inside the freezer, and one dead cat under the entertainment center.[2] The back yard contained several filthy pens in which cats were kept, many of them ill.

The animals were removed to the Montgomery County SPCA where they were examined by a veterinarian. She found that although some were healthy, many were emaciated and had fleas, and others suffered from diseases. Upon her review of photographs of the house and the condition of the animals, she concluded that the filthy state of the house was a breeding ground for disease.

The Defendant was charged in one hundred five citations of violating 18 Pa.C.S. §5511(c):

> "Cruelty to animals. A person commits a summary offense if he wantonly or cruelly ill treats, overloads, beats, otherwise buses any animal, or neglects any animal as to which he has a duty of care, whether belonging to himself or otherwise, or abandons any animal or deprives any animal of necessary sustenance, drink, shelter or veterinary

[1] The hamsters, rats and turtle were returned to Ms. Jones and are not the subject of charges in this case.

[2] No citations were issued charging cruelty to the dead animals, but their presence contributed to the unsanitary conditions.

care, or access to clean and sanitary shelter which will protect the animal against inclement weather and preserve the animal's body heat and keep it dry.

This subsection shall not apply to activity undertaken in normal agricultural operation."

Subsection (m) provides:

"Forfeiture. In addition to any other penalty provided by law, the authority imposing sentence upon a conviction of any violation of this section may order the forfeiture or surrender of any abused, neglected or deprived animal of the defendant to any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth."

Ms. Jones was convicted of one hundred five summary offenses by the District Justice, and appealed to this Court for a *de novo* trial on January 10, 2003. The case was listed to be tried on July 3, 2003, but was continued. At the conclusion of a two day non jury trial on November 12 and 13, 2003, we found the Defendant guilty of one hundred five summary offenses of cruelty to animals based on the denial of clean and sanitary shelter. We imposed no fine or imprisonment, but sentenced the Defendant to pay Forty-Five Thousand Six Hundred Dollars for the veterinary treatment and boarding of the animals. We also ordered forfeiture.

On the morning of trial the Defendant presented, for the first time, a Motion to Suppress Evidence. We refused to hear that Motion, and denied it, because it was filed untimely. The Defendant argued that there is no time limitation on the filing of this Motion because omnibus pretrial motions must be filed within thirty days

of arraignment, and there is no Common Pleas arraignment on appeal from summary conviction.

Once an appeal from a summary conviction is taken to a Court of Common Pleas, all general provisions of the Pennsylvania Rules of Criminal Procedure become applicable to the *de novo* trial unless they are made inapplicable expressly. ***Commonwealth v. Koch***, 288 Pa. Super. 290, 431 A.2d 1052 (1981) (en banc). In ***Commonwealth v. Trunzo***, 404 Pa. Super. 15, 589 A.2d 1147 (1991), which addressed a suppression issue, the Court observed:

> "For edification purposes, given counsel for the appellant's admitted confusion as to whether he could have filed a formal omnibus pre-trial motion to suppress in Common Pleas Court, as compared to raising it orally at pre-trial following the District Justice's finding the appellant guilty of the summary offense of underage drinking, we would point out that since Commonwealth v. Koch, 288 Pa. Super. 290, 431 A.2d 1052 (1981) (en banc), it has been the practice in this Commonwealth that:
>
> 'once an appeal is taken to the Court of Common Pleas [from a summary conviction], ...all general provisions of the criminal rules become applicable to the trial de novo unless specifically made inapplicable [e.g., Rules 1100 and 316]'..." 589 A.2d at 1149, n.3.

Although there is no arraignment for appeals from summary convictions, and Pa. R. Crim. P. 579(A) provides that the omnibus pretrial motion be filed within thirty days of arraignment, Pa. R. Crim. P. 581(H) places on the Commonwealth the burden of going forward with the evidence. This contemplates that the Commonwealth

have knowledge of the grounds for the suppression motion, and the opportunity to procure and prepare witnesses. Although Rule 581(B) requires that the motion be contained in the omnibus pretrial motion, which is due within thirty days of arraignment, the suppression motion must be filed prior to trial. ***Commonwealth v. Barnyak***, 432 Pa. Super. 483, 639 A.2d 40, *allocatur denied*, 539 Pa. 674, 652 A.2d 1319 (1994) *cert. denied* 515 U.S. 1130 (1995).

We conclude that unless the opportunity did not previously exist or the interest of justice otherwise requires, (as provided in Pa. R.Crim.P. 581 (B)) the motion to suppress and other pretrial motions should be filed within thirty days of the date of the summary appeal is filed. Since the Defendant failed to do this, failed to file the motion prior to the first listing of this case in July, 2003, and waited until the morning of the first day of trial, the motion was denied as untimely filed.

At the outset of the trial, the Defendant demanded a jury trial, asserting that since there were one hundred five charges, each of which could potentially carried a sentence of ninety days imprisonment, the Defendant faced more than six months in prison, and had the constitutional right to a trial by jury. This position was rejected by the United States Supreme Court in ***Lewis v. United States***, 518 U.S. 322, 135 L.Ed.2d 590, 116 S.Ct. 2163 (1996). The Supreme Court distinguished contempt cases where the penalty is not prescribed by statute, and in which the total sentence imposed must be addressed, including ***Codispoti v. Pennsylvania,*** 418 U.S. 506, 41 L.Ed.2d 912, 94 S.Ct. 2687 (1974), upon which the Defendant relied, from cases, like the present, in which the Legislature fixes a penalty. The Court explained:

> "Certainly the aggregate potential penalty faced by petitioner is of serious importance to him. But to determine whether an offense is serious for Sixth Amendment purposes, we look to the legislature's judgment, as evidenced by the maximum penalty authorized. Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply. As petitioner acknowledges, even if he were to prevail, the Government could properly circumvent the jury trial right by charging the counts in separate informations and trying them separately." 116 S.Ct. at 2168.

Therefore, Defendant was not entitled to a trial by jury.

The Defendant attacks several rulings excluding evidence and restricting cross examination during trial. We permitted the humane society police officers to testify to their opinion relating to the presence of animal urine and feces. We refused to allow them to be cross examined regarding their training in crime scene photographs and preservation of evidence. We refused to allow the Defendant's veterinarian to testify about crime scene photography and preservation of evidence. We refused to admit records of the Montgomery County SPCA relating to the number of animals it has euthanized.

Although those objections were sustained, we permitted testimony that a simple test is available for the presence of animal feces. We admitted into evidence the veterinary records of these particular animals at the SPCA, including information about the number already euthanized. We allowed cross-examination regarding the photographic techniques employed

The humane society officers were permitted to express their opinions, both as lay persons and experts, concerning the presence of urine and feces. Pennsylvania applies an extremely liberal standard to the admission of opinion evidence. Any person who has a reasonable pretension to specialized knowledge may give opinions within that field. E.g., ***Reading Radio, Inc. v. Fink***, 833 A.2d 199 (Pa. Super. 2003).

The Defendant argued that these opinions should have been excluded because of the availability of simple testing procedures, and the failure to utilize them. This does not affect the admissibility of the opinion. For example, even though chemical tests of blood or breath are available, a lay person may express an opinion whether someone is intoxicated, ***Interest of Wright***, 265 Pa. Super. 278, 401 A.2d 1209 (1979), or even intoxicated to the point of being incapable of safe driving. ***Commonwealth v. Neiswonger***, 338 Pa. Super. 625, 488 A.2d 68 (1985). Although there are tests to determine whether substances are narcotics, an addict may testify as an expert, and express an opinion that the substance he purchased was heroin, based on his observation of it and the effects it had on him. ***Commonwealth v. Harris***, 186 Pa. Super. 59, 140 A.2d 344 (1958). Surely, two humane society officers, both of whom had years of experience working in animal shelters and knowledge of the look and smell of animal feces and urine, could testify that the substances in the litter boxes, and covering the outside of the litter boxes, the kitchen counters and the walls, were cat feces and urine.

We refused to allow those witnesses to testify with regard to what their "training manuals" prescribed with regard to crime scene photographs and preservation of evidence because this was not relevant to the issues. First, we note that the "manuals" (Exhibits D-2 and D-3)

are, respectively, a compilation of the slides used in a training course, and a portion of an outline of another lecture. There was no evidence which suggested that the information and techniques provided in training had anything to do with the legal standards for the admission of evidence or its weight. In order to examine a witness about a manual, there must be evidence which establishes it as an authoritative text, and it must be relevant to the issues raised. ***Christiansen v. Silfes***, 446 Pa. Super. 464, 667 A.2d 396 (1995), *allocatur denied,* 546 Pa. 674, 686 A.2d 1307 (1996). Although a book identified as an authoritative treatise may be referred to as the basis for an expert's opinion, the document is not evidence, nor may it become the focus of the testimony. ***Aldridge v. Edmunds***, 561 Pa. 232, 750 A.2d 292 (2000).

The "training manuals", and proposed testimony of Defendant's expert regarding crime scene photography do not address the standards for the admissibility of photographs: that a witness testify the photograph actually represents the scene at the time in question, ***Commonwealth v. McClintock***, 433 Pa. Super. 83, 639 A.2d 1222 (1994) or explain the differences between the scene shown in the photograph, and the scene as it existed at the relevant time. ***Aiello v. Southeastern Pennsylvania Transportation Authority***, 687 A.2d 399, 403 (Pa. Cmwlth. 1996) *appeal dismissed*, 554 Pa. 244, 720 A.2d 1050 (1998).

The humane society officer who took the photographs, and the officer in charge testified to the accuracy of the photographs. They were cross examined regarding this testimony, and that cross examination included their failure to use a tripod, failure to photograph the larger scene followed by photographs of detail, failure to photograph each object from four positions, failure to photograph prior to any disturbance of the scene, and

failure to maintain a log. The photographer explained that these techniques could not be followed with living, moving animals, nor with dead animals that were under furniture and inside the freezer. Whether the officers were trained to do certain things is of no moment, since the question was accuracy, that issue was fully explore, and there was no proof that the supposed training was addressed to admissibility, as opposed, perhaps, to the need to photograph a crime scene in pristine condition for investigative purposes.

We also restricted cross examination of these witnesses, direct examination of Plaintiff's expert, and the admission of testimony concerning the number of animals euthanized by the Montgomery County SPCA as irrelevant to the issues. Evidence is relevant if it tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis or support for a reasonable inference regarding the existence of a material fact. ***Commonwealth v. McClintock***, 433 Pa. Super. 83, 639 A.2d 1222 (1994). Cross examination is within the discretion of the Trial Judge, who may preclude examination on collateral matters and those which tend to blacken the character of a witness. ***Commonwealth v. Rizzuto***, 566 Pa. 40, 777 A.2d 1069 (2001); ***Commonwealth v. Dowling***, 778 A.2d 683 (Pa. Super. 2001); ***Commonwealth v. Marchand,*** 452 Pa. Super. 625, 682 A.2d 841 (1996), *allocatur denied*, 547 Pa. 752, 692 A.2d 564 (1997). The evidence was kept within the limits of the issues in the case.

The Defendant argues that we should have allowed records regarding animals euthanized by the SPCA on the question of the forfeiture of the animals. While the power to order forfeiture is discretionary, 18 Pa. C.S. §1511(m), quoted above, reflects the legislative judgment that a society for prevention of cruelty to animals is the

appropriate agency to which animals will be forfeited. Presumably the legislature knew of the practice of euthanizing animals which are ill, or which are not adopted when it made this determination. That issue was therefore irrelevant to our forfeiture decision.

Finally, the Defendant asserts that once the supposedly improperly admitted evidence is excluded, the verdicts are based on insufficient evidence, or are against its weight. The facts and circumstances need not be absolutely incompatible with innocence, but the question is for the trier of fact, unless the evidence is so weak and inconclusive that no probability of fact can be drawn from the circumstances. ***Commonwealth v. Aguado***, 760 A.2d 1181, 1184-1185 (Pa. Super. 2000). A verdict may be found to be against the weight of the evidence only if the evidence is so unreliable or contradictory as to make any verdict based on it pure conjecture. ***Commonwealth v. Mechalski***, 707 A.2d 528, 531 (Pa. Super. 1998). The observations of the humane society police officers, and photographs, and the opinion of its veterinarians established beyond a reasonable doubt that the conditions of Janet Jones' house was beyond unsanitary. It was filthy and permitted the spread of disease among these animals.

BY THE COURT:

S/Albert R. Suber

S.J.

Notice sent this 9th day of February, 2004.

COMMONWEALTH OF PENNSYLVANIA:
IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellee :

v.

JANET JONES,

Appellant : No. 3772 EDA 2003

Appeal from the Judgment of Sentence November 14, 2003

In the Court of Common Pleas of Montgomery County

Criminal at No. 129-03

BEFORE: STEVENS, KLEIN, JJ., and MCEWEN, P.J.E.

MEMORANDUM: **FILED OCTOBER 29, 2004**

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Montgomery County sentencing Appellant to pay $45,600 and forfeit the animals that were within her care. On appeal, Appellant claims that (1) the trial court erred in denying her suppression motion as untimely filed; (2) in denying her motion *in limine* to preclude testimony regarding substances seen on the walls and floors of her home; (3) in restricting her right to cross-examine various witnesses; (4) in limiting her expert's testimony; (5) in sentencing her to forfeiture based on the weight and sufficiency of the evidence; and (6) in depriving her of a jury trial on the summary convictions. We affirm.

The trial court states the facts as follows:

On September 13, 2002 two humane society police officers from the Montgomery County Society for Prevention of Cruelty to Animals visited the home of Janet Jones in Hatfield Township, Montgomery County, in response to a complaint. When they got within five to seven feet of the closed door of the house, they smelled a strong odor of cat urine. When the door was opened the smell doubled. The officers were admitted to the home by Ms. Jones, where the smell was overpowering. Blinds were drawn and the other windows were covered. The house was piled high with animal cages and crates. The officers noticed approximately twenty cats and seven dogs during that visit.

The officers left, and made sure that their shelter could receive the animals. One sought and obtained a warrant while the other waited. The officers entered with several shelter employees and local police officers. Over the course of nine hours they removed ninety-six cats, nine dogs, several hamsters, rats and a turtle.

During the time in the house the officers observed litter boxes, walls and kitchen counters covered with animal feces. Walls were streaked with urine. There were dead animals in bags inside the freezer, and one dead cat under the entertainment center. The back yard contained several filthy pens in which cats were kept, many of them ill.

The animals were removed to the Montgomery County SPCA where they were examined by a veterinarian. She found that, although some were healthy, many were emaciated and had fleas, and others suffered from disease. Upon her review of photographs of the house and the condition of the animals, she concluded that the filthy state of the house was a breeding ground for disease.

The Defendant was charged in one hundred five citations of violating 18 Pa.C.S. §5511 (c).]

. . .

Ms. Jones was convicted of one hundred five summary offenses by the District Justice, and appealed to this Court for a *de novo* trial on January 10, 2003. The case was listed to be tried on July 3, 2003, but was continued. At the conclusion of a two day non jury trial on November 12 and 13, 2003, we found the Defendant guilty of one hundred five summary offenses of cruelty to animals based on the denial of clean and sanitary shelter. We imposed no fine or imprisonment, but sentenced the Defendant to pay Forty-Five Thousand Six Hundred Dollars for the veterinary treatment and boarding of the animals. We also ordered forfeiture.

On the morning of trial the Defendant presented, for the first time, a Motion to Suppress Evidence. We refused to hear that Motion, and denied it, because it was filed untimely.

Trial Court Opinion 2/9/04 at 1-3.

Appellant filed an appeal to this Court and the trial court ordered Appellant to file a statement pursuant to Pa.R.A.P. 1925(b). The requested statement was filed and the trial court filed a Pa.R.A.P. 1925(a) opinion.

Our standard of review from an appeal of a summary conviction heard *de novo* by the trial court is limited to a determination of whether an error of law has been committed and whether the findings of fact are supported by competent evidence. The adjudication of the trial court will not be disturbed on appeal absent a manifest abuse of discretion.

Commonwealth v. Marizzaldi, 814 A.2d 249, 250 (Pa. Super. 2002) (citations and quotation marks omitted).

In reviewing the denial of a motion to suppress, our responsibility is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. If the suppression court held for the prosecution, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, the appellate court may reverse if there is an error in the legal conclusions drawn from those factual findings.

Commonwealth v. Parker, 847 A.2d 745, 748 (Pa. Super. 2004).

Appellant claims that the trial court erroneously denied the suppression motion which was filed on the date of trial by finding that it was untimely. Initially, we note that once an appellant files an appeal from a summary conviction, "all general provisions of the criminal rules become applicable to the trial de novo unless specifically made inapplicable)." ***Commonwealth v. Trunzo***, 589 A.2d 1147, 1149 (Pa. Super. 1991) (citation omitted).

Under *Pa.R.Crim.P. 581(B)*, the defendant shall file suppression issues within an omnibus pretrial motion. "The motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof." *Pa.R.Crim.P. 581(D)*. Thus, "the rule is designed to

provide one single procedure for the suppression of evidence [.]" *Rule 581*, official comment. A defendant may file supplemental motions to suppress, but only "unless the opportunity did not previously exist, or the interests of justice otherwise require." *Pa.R.Crim.P.* 581(B); *Commonwealth v. Micklos, 448 Pa.Super. 560, 672, A.2d 796, 802 (Pa. Super. 1996).* The 'interests of justice' exception provides a trial judge with discretion to excuse a party's tardy presentation of a suppression motion." *Id.*

Commonwealth v. Johonoson, 844 A.2d 556, 560-561 (Pa. Super. 2004).

Appellant maintains that a suppression motion filed relating to summary convictions should be treated differently in that no arraignment takes place; and therefore, the time limits applicable to filing such a motion ordinarily are inapplicable to summary convictions. We cannot agree as Appellant clearly could have filed a pre-trial motion prior to the date of trial in this case and chose to wait until just prior. As the opportunity to file previously existed and as the Commonwealth was denied the opportunity to prepare for such a motion, we must conclude that the trial court did not error in finding the suppression motion untimely.

Next, Appellant claims that the trial court erred in failing to grant her motion *in limine* to preclude testimony on the substances found on the walls and floors.

It is well settled that the admissibility of evidence is a matter addressed to the sound discretion of the trial court and may be reversed only upon a showing that the court abused that discretion.

An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is

overridden or misapplied, or the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will as shown by the evidence of record, discretion is abused.

Evidence is admissible if it is relevant—that is, if it tends to establish a material fact, makes a fact a tissue more or less probable, or supports a reasonable inference supporting a material fact.

Commonwealth v. Wynn, 850 A.2d 730, 733 (Pa. Super. 2004) (citations omitted).

Appellant maintains that it was error for the trial court to permit the lay witnesses, the humane society officers, to testify regarding the substances found on the walls and floors when they failed to gather and process evidence in accordance with proper SPCA procedures and further, where the photographs taken were misleading and an identification of the substances could not be positively determined from the photos.

The Pennsylvania Rules of Evidence do not prohibit a lay witness from offering an opinion at trial. *Rule 701* permits a lay witness to offer an opinion in certain circumstances, and provides as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [which addresses testimony by experts].

Commonwealth v. Blessitt, 852 A.2d 1215, 1218 (Pa. Super. 2004).

At trial, Humane Society Officer Langiotti testified that he has dealt with sanitary violations in the past. N.T. 11/12/03 at 27. Upon visiting Appellant's home, he detected a strong odor of animal urine and feces. *Id.* At 28. The smell was so strong that it affected his breathing. *Id.* at 29. Upon finding Appellant's home in this unsanitary state, Officer Langiotti proceeded to obtain a warrant. *Id.* at 30. Once he returned with the warrant, Officer Langiotti went back to Appellant's residence and began removing the animals and taking pictures. *Id.* Officer Langiotti testified to his knowledge of the scent of animal urine and feces and also his knowledge of what these substances looked like. *Id.* at 32-34. Additionally, Officer Langiotti indicated he had training in taking photographs of crime scenes and he attested to the accuracy of the photographs taken here. *Id.* at 43

Similarly, Humane Society officer Rhonda Davis testified that she smelled urine and feces in Appellant's home. *Id.* at 172. Based on her experience, Officer Davis indicated that she saw marks on the walls and floors indicating the presence of animal feces. *Id.* at 175. Furthermore, Officer Davis indicated that she did not send the substances for testing based on their obvious appearance and her knowledge in these matters. *Id.* at 187. Based on the foregoing, we cannot conclude that the trial court abused its discretion in permitting these officers to give their opinions, rationally based on their perception that the substances found with the home were animal urine and feces.

Likewise, with regards to Appellant's third issue relating to the trial court's limitation of cross-examination of these witnesses lacks merit. The manual and

procedure of the SPCA and the instructional procedure for photographing the scene are irrelevant as neither impacts the admissibility of such evidence based on the knowledge and perceptions of the officers.

In Appellant's fourth issue, she alleges that the trial court erred in limiting the examination of her expert witness as he was not permitted to testify regarding the cruelty charges.

[W]e note that the qualification of a witness as a expert rests within the sound discretion of the trial court, and the court's determination in this regard will not be disturbed absent an abuse of discretion.

The standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. A witness does not need formal education on the subject matter of the testimony, and may be qualified to render an expert opinion based on training and experience.

Commonwealth v. Malseed, 847 A.2d 112, 114 (Pa. Super. 2004).

Appellant again argues that evidence should have been admitted regarding the procedures utilized in gathering the evidence and taking the photographs. As we have already determined that these matters are irrelevant, we make no further determination regarding the limitation placed on the expert.

Appellant complains that the trial court erred in finding the evidence sufficient to warrant a sentence of forfeiture.

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable date. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Distefano, 782 A.2d 574, 582 (Pa.Super. 2001), *appeal denied*, 569 Pa. 716, 806 A.2d 858 (2002) (internal citations and quotation marks omitted).

Appellant does not base her claim on the conditions existing when her pets were removed. Rather, she requested that the trial court consider the conditions after the animals were removed and she cleaned the home. Neither the conditions existing after the animals were removed nor the treatment of the animals subsequent to their removal is relevant to the consideration of the

circumstances which necessitated the pets removal and subsequent retention. Thus, this claim lacks merit.

Appellant also claims that the verdict was against the weight of the evidence.

With respect to the weight of the evidence claim, we note that an allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. Appellate review of a weight claim is review of the exercise of discretion, not the underlying questions of whether the verdict is against the weight of the evidence. A new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Commonwealth v. Wright, 846 A.2d 730, 736 (Pa. Super. 2004) (internal citations and quotation marks omitted). After a review of the testimony, we cannot find it would shock one's sense of justice for the judge to order forfeiture based on the conditions present in the home. Accordingly, the trial court did not abuse its discretion and Appellant's weight of the evidence claim must fail.

Lastly, Appellant complains that the court erred in denying her a right to a jury trial.

Certainly the aggregate potential penalty faced by petitioner is of serious importance to him. But to determine whether an offense is serious for Sixth Amendment purposes, we look to the legislature's judgment, as evidenced by the maximum penalty authorized. Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply. As petitioner acknowledges, even if he were to prevail, the Government

could properly circumvent the jury trial by charging the counts in separate informations and trying them separately.

Lewis v. United States, 518 U.S. 322, 330, 116 S.Ct. 2163, 2167, 135 L.Ed.2d 590, 598 (1996). Appellant does not dispute that the sentence on an individual charge of cruelty to animals would not necessitate a jury trial on the summary offense. Rather, Appellant makes the exact argument presented before the United States Supreme Court claiming that because the aggregation of the potential sentences results in a sentence in excess of the amount delineated, she should have the right to a jury trial. As the United States Supreme Court rejected this argument, we too determine that it is inconsequential that the sentence could exceed the threshold amount. Furthermore, that she was sentenced to pay allegedly excessive amounts, does not impinge on our finding that her sentence did not rise to the level in which a jury trial is warranted. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered

/S_____

Prothonotary

Date:_____Oct 29, 2004_____

J. A33013/04

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JANET JONES,

Appellant No. 3772 EDA 2003

ORDER

AND NOW, this 29th day of December, 2004, IT IS HEREBY ORDERED:

THAT the application filed November 12, 2004, requesting reargument/reconsideration of the decision dated October 29,2004, is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH OF
PENNSYLVANIA:No78MAL 2005

Respondent

Petition for Allowance of
Appeal from the Order of the
Superior Court

V.

JANET JONES,

Petitioner

ORDER

PER CURIAM

AND NOW, this 2nd day of June 2005, the Petition for Allowance of Appeal is DENIED.

TRUE AND CORRECT COPY

ATTEST: June 2, 2005

/S

Amy K. Swartz,

Appellate Court Clerk

5. U.S.C.A. Const. Amend. IV

Amendment IV, Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

6. U.S.C.A. Const. Amend. VI

Amendment VI, Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

7. Pennsylvania Supreme Court. Pa. Const.art. V, §10(c)

The Supreme Court shall have the power to prescribe general rules governing practice procedure in the conduct of all Courts, justices of the peace and all officers serving process on forcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require and for admission to the bar and to practice law, and the

administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor effect the right of the General Assembly to determine the jurisdiction of any Court or Justice of the peace, nor suspend nor alter any statute of limitation or repose. All law shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotape depositions or testimony by close circuit television.

8. Pennsylvania Rule of Criminal Procedure Rule 578. Omnibus Pretrial Motion for Relief

Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion.

9. Pennsylvania Rule of Criminal Procedure Rule 579. Time for Omnibus Pretrial Motion and Service.

(A) Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefore did not exist, or the Defendant or defense attorney, or the attorney for the commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

(B) Copies all pretrial motions shall be served in accordance with Rule 576.

10. Pennsylvania Rule of Criminal Procedure Rule 580. Disposition of Pretrial Motions.

Unless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.

11. Pennsylvania Rule of Criminal Procedure Rule 581. Suppression of Evidence.

(A) The defendant's attorney, or the defendant if

unrepresented, may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights.

(B) Unless the opportunity did not previously exist, or the interest of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

(C) Such motion shall be made to the court of the county in which the prosecution is pending..

(D) The motion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in the support thereof.

(E) A hearing shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). A hearing may be either prior to or at trial, and shall afford the attorney for the Commonwealth a reasonable opportunity for investigation. The judge shall enter such interim order

as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

(F) The hearing, either before or at trial, ordinarily shall be held in open court. The hearing shall be held outside the presence of the jury. In all cases, the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 110 and 111.

(G) A record shall be made of all evidence adducted at the hearing.

(H) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The defendant may testify at such hearing, and if the defendant does testify, the defendant does not thereby waive the right to remain silent during trial.

(I) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights, or in violation of these rules or any statute, and shall make an order grant or denying the relief sought.

(J) If the court determines that the evidence shall not be suppressed, such determination shall be final, conclusive, and binding at trial, except upon a showing of evidence which was therefore, unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its suppressibility.

12. 18 Pa. C.S.A. §5511

§ 5511. Cruelty to animals

(a) Killing, maiming or poisoning domestic animals or zoo animals, etc.--

(1) A person commits a misdemeanor of the second degree if he willfully and maliciously:

(i) Kills, maims or disfigures any domestic animal of another person or any domestic fowl of another person.

(ii) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any domestic animal of another person or domestic fowl of another person.

(iii) Harasses, annoys, injures, attempts to injure, molests or interferes with a dog guide for an individual who is blind, a hearing dog for an individual who is deaf or audibly impaired or a service dog for an individual who is physically limited.

Any person convicted of violating the provisions of this paragraph shall be sentenced to pay a fine of not less than $500.

(2) A person commits a felony of the third degree if he willfully and maliciously:

(i) Kills, maims or disfigures any zoo animal in captivity.

(ii) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any zoo animal in captivity.

(2.1) (i) A person commits a misdemeanor of the first degree if he willfully and maliciously:

(A) Kills, maims, mutilates, tortures or disfigures any dog or cat, whether belonging to himself or otherwise. If a person kills, maims, mutilates, tortures or disfigures a dog guide for an individual who is blind, a hearing dog for an individual who is deaf or audibly impaired or a service dog for an individual who is physically limited, whether belonging to the individual or otherwise, that person, in addition to any other applicable penalty, shall be required to make reparations for veterinary costs in treating the dog and, if necessary, the cost of obtaining and training a replacement dog.

(B) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any dog or cat, whether belonging to himself or otherwise.

(ii) Any person convicted of violating the provisions of this paragraph shall be sentenced to pay a fine of not less than $1,000 or to imprisonment for not more than two years, or both. The court may also order a presentence mental evaluation. A subsequent conviction under this paragraph shall be a felony of the third degree. This paragraph shall apply to dogs and cats only.

(iii) The killing of a dog or cat by the owner of that animal is not malicious if it is accomplished in accordance with the act of December 22, 1983 (P.L. 303, No. 83), [FN1] referred to as the Animal Destruction Method Authorization Law.

(3) This subsection shall not apply to:

(i) the killing of any animal taken or found in the act of actually destroying any domestic animal or domestic fowl;

(ii) the killing of any animal or fowl pursuant to the act of June 3, 1937 (P.L. 1225, No. 316), [FN2] known as The

Game Law, or 34 Pa.C.S. §§ 2384 (relating to declaring dogs public nuisances) and 2385 (relating to

destruction of dogs declared public nuisances), or the regulations promulgated thereunder; or

(iii) such reasonable activity as may be undertaken in connection with vermin control or pest control.

(b) Regulating certain actions concerning fowl or rabbits.--A person commits a summary offense if he sells, offers for sale, barters, or gives away baby chickens, ducklings, or other fowl, under one month of age, or rabbits under two months of age, as pets, toys, premiums or novelties or if he colors, dyes, stains or otherwise changes the natural color of baby chickens, ducklings or other fowl, or rabbits or if he brings or transports the same into this Commonwealth. This section shall not be construed to prohibit the sale or display of such baby chickens, ducklings, or other fowl, or such rabbits, in proper facilities by persons engaged in the business of selling them for purposes of commercial breeding and raising.

(c) Cruelty to animals.--

(1) A person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a duty of care, whether belonging to himself or otherwise, or abandons any animal, or deprives any animal of necessary sustenance, drink, shelter or veterinary care, or access to clean and sanitary shelter which will protect the animal against inclement weather and preserve the animal's body heat and keep it dry.

(2) (i) Except as provided in subparagraph (ii), a person convicted of violating paragraph (1) commits a summary offense.

(ii) A person convicted for a second or subsequent time of violating paragraph (1) commits a misdemeanor of the third degree if all of the following occurred:

(A) The action or omission for which the person was convicted for a subsequent time was performed on a dog or cat.

(B) The dog or cat was seriously injured, suffered severe physical distress or was placed at imminent risk of serious physical harm as the result of the person's action or omission.

(3) This subsection shall not apply to activity undertaken in normal agricultural operation.

(d) Selling or using disabled horse.--A person commits a summary offense if he offers for sale or sells any horse, which by reason of debility, disease or lameness, or for other cause, could not be worked or used without violating the laws against cruelty to animals, or leads, rides, drives or transports any such horse for any purpose, except that of conveying the horse to the nearest available appropriate facility for its humane keeping or destruction or for medical or surgical treatment.

(e) Transporting animals in cruel manner.--A person commits a summary offense if he carries, or causes, or allows to be carried in or upon any cart, or other vehicle whatsoever, any animal in a cruel or inhumane manner. The person taking him into custody may take charge of the animal and of any such vehicle and its contents, and deposit the same in some safe place of custody, and any necessary expenses which may be incurred for taking

charge of and keeping the same, and sustaining any such animal, shall be a lien thereon, to be paid before the same can lawfully be recovered, or the said expenses or any part thereof remaining unpaid may be recovered by the person incurring the same from the owner of said creature in any action therefor.

For the purposes of this section, it shall not be deemed cruel or inhumane to transport live poultry in crates so long as not more than 15 pounds of live poultry are allocated to each cubic foot of space in the crate.

(e.1) Transporting equine animals in cruel manner.--Notwithstanding any other provision of law, a person commits a summary offense for each equine animal if the person carries, or causes or allows to be carried, any equine animal in or upon any conveyance or other vehicle whatsoever with two or more levels stacked on top of one another. A person who violates this subsection on a second or subsequent occasion commits a misdemeanor of the third degree for each equine animal transported.

(f) Hours of labor of animals.--A person commits a summary offense if he leads, drives, rides or works or causes or permits any other person to lead, drive, ride or work any horse, mare, mule, ox, or any other animal, whether belonging to himself or in his possession or control, for more than 15 hours in any 24 hour period, or more than 90 hours in any one week.

Nothing in this subsection contained shall be construed to warrant any persons leading, driving, riding or walking any animal a less period than 15 hours, when so doing shall in any way violate the laws against cruelty to animals.

(g) Cruelty to cow to enhance appearance of udder.--A person commits a summary offense if he kneads or beats or pads the udder of any cow, or willfully allows it to go unmilked for a period of 24 hours or more, for the purpose of enhancing the appearance or size of the udder of said cow, or by a muzzle or any other device prevents its calf, if less than six weeks old, from obtaining nourishment, and thereby relieving the udder of said cow, for a period of 24 hours.

(h) Cropping ears of dog; prima facie evidence of violation.--A person commits a summary offense if he crops or cuts off, or causes or procures to be cropped or cut off, the whole, or part of the ear or ears of a dog or shows or exhibits or procures the showing or exhibition of any dog whose ear is or ears are cropped or cut off, in whole or in part, unless the person showing such dog has

in his possession either a certificate of veterinarian stating that such cropping was done by the veterinarian or a certificate of registration from a county treasurer, showing that such dog was cut or cropped before this section became effective.

The provisions of this section shall not prevent a veterinarian from cutting or cropping the whole or part of the ear or ears of a dog when such dog is anesthetized, and shall not prevent any person from causing or procuring such cutting or cropping of a dog's ear or ears by a veterinarian.

The possession by any person of a dog with an ear or ears cut off or cropped and with the wound resulting therefrom unhealed, or any such dog being found in the charge or custody of any person or confined upon the premises owned by or under the control of any person, shall be

prima facie evidence of a violation of this subsection by such person except as provided for in this subsection.

The owner of any dog whose ear or ears have been cut off or cropped before this section became effective may, if a resident of this Commonwealth, register such dog with the treasurer of the county where he resides, and if a nonresident of this Commonwealth, with the treasurer of any county of this Commonwealth, by certifying, under oath, that the ear or ears of such dog were cut or cropped before this section became effective, and the payment of a fee of $1 into the county treasury. The said treasurer shall thereupon issue to such person a certificate showing such dog to be a lawfully cropped dog.

(h.1) Animal fighting.--A person commits a felony of the third degree if he:

(1) for amusement or gain, causes, allows or permits any animal to engage in animal fighting;

(2) receives compensation for the admission of another person to any place kept or used for animal fighting;

(3) owns, possesses, keeps, trains, promotes, purchases or knowingly sells any animal for animal fighting;

(4) in any way knowingly encourages, aids or assists therein;

(5) wagers on the outcome of an animal fight;

(6) pays for admission to an animal fight or attends an animal fight as a spectator; or

(7) knowingly permits any place under his control or possession to be kept or used for animal fighting.

This subsection shall not apply to activity undertaken in a normal agricultural operation.

(i) Power to initiate criminal proceedings.--An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure. An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section.

(j) Seizure of animals kept or used for animal fighting.--Any police officer or agent of a society or association for the prevention of cruelty to animals incorporated under the laws of this Commonwealth, shall have power to seize any animal kept, used, or intended to be used for animal fighting. When the seizure is made, the animal or animals so seized shall not be deemed absolutely forfeited, but shall be held by the officer or agent seizing the same until a conviction of some person is first obtained for a violation of subsection (h.1). The officer or agent making such seizure shall make due return to the issuing authority, of the number and kind of animals or creatures so seized by him. Where an animal is thus seized, the police officer or agent is authorized to provide such care as is reasonably necessary, and where any animal thus seized is found to be disabled, injured or diseased beyond reasonable hope of recovery, the police officer or agent is authorized to provide for the humane destruction of the animal. In addition to any other penalty provided by law, the authority imposing sentence upon a conviction for any violation of subsection (h.1) shall order the forfeiture or surrender of any abused, neglected or

deprived animal of the defendant to any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth and shall require that the owner pay the cost of the keeping, care and destruction of the animal.

(k) Killing homing pigeons.--A person commits a summary offense if he shoots, maims or kills any antwerp or homing pigeon, either while on flight or at rest, or detains or entraps any such pigeon which carries the name of its owner.

(l) Search warrants.--Where a violation of this section is alleged, any issuing authority may, in compliance with the applicable provisions of the Pennsylvania Rules of Criminal Procedure, issue to any police officer or any agent of any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth a search warrant authorizing the search of any building or any enclosure in which any violation of this section is occurring or has occurred, and authorizing the seizure of evidence of the violation including, but not limited to, the animals which were the subject of the violation. Where an animal thus seized is found to be neglected or starving, the police officer or agent is authorized to provide such care as is reasonably necessary, and where any animal thus seized is found to be disabled, injured or diseased beyond reasonable hope of recovery, the police officer or agent is authorized to provide for the humane destruction of the animal. The cost of the keeping, care and destruction of the animal shall be paid by the owner thereof and claims for the costs shall constitute a lien upon the animal. In addition to any other penalty provided by law, the authority imposing sentence upon a conviction for any violation of this section may require that the owner pay the cost of the keeping, care and destruction of the animal. No search

warrant shall be issued based upon an alleged violation of this section which authorizes any police officer or agent or other person to enter upon or search premises where scientific research work is being conducted by, or under the supervision of, graduates of duly accredited scientific schools or where biological products are being produced for the care or prevention of disease.

(m) Forfeiture.--In addition to any other penalty provided by law, the authority imposing sentence upon a conviction for any violation of this section may order the forfeiture or surrender of any abused, neglected or deprived animal of the defendant to any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth.

(m.1) Fine for summary offense.--In addition to any other penalty provided by law, a person convicted of a summary offense under this section shall pay a fine of not less than $50 nor more than $750 or to imprisonment for not more than 90 days, or both.

(m.2) Prohibition of ownership.--Notwithstanding any provision of law and in addition to any other penalty provided by law, the authority imposing sentence upon a conviction for any violation of this section may order the prohibition or limitation of the defendant's ownership, possession, control or custody of animals or employment with the care of animals for a period of time not to exceed the statutory maximum term of imprisonment applicable to the offense for which sentence is being imposed.

(n) Skinning of and selling or buying pelts of dogs and cats.--A person commits a summary offense if he skins a dog or cat or offers for sale or exchange or offers to buy or exchange the pelt or pelts of any dog or cat.

(o) Representation of humane society by attorney.--Upon prior authorization and approval by the district attorney of the county in which the proceeding is held, an association or agent may be represented in any proceeding under this section by any attorney admitted to practice before the Supreme Court of Pennsylvania and in good standing. Attorney's fees shall be borne by the humane society or association which is represented.

(o.1) Construction of section.--The provisions of this section shall not supersede the act of December 7, 1982 (P.L. 784, No. 225), [FN3] known as the Dog Law.

(p) Applicability of section.--This section shall not apply to, interfere with or hinder any activity which is authorized or permitted pursuant to the act of June 3, 1937 (P.L.1225, No. 316), known as The Game Law or Title 34 (relating to game).

(q) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Animal fighting." Fighting or baiting any bull, bear, dog, cock or other creature.

"Audibly impaired." The inability to hear air conduction thresholds at an average of 40 decibels or greater in the better ear.

"Blind." Having a visual acuity of 20/200 or less in the better eye with correction or having a limitation of the field of vision such that the widest diameter of the visual field subtends an angular distance not greater than 20 degrees.

"Conveyance." A truck, tractor, trailer or semitrailer, or any combination of these, propelled or drawn by mechanical power.

"Deaf." Totally impaired hearing or hearing with or without amplification which is so seriously impaired that the primary means of receiving spoken language is through other sensory input, including, but not limited to, lip reading, sign language, finger spelling or reading.

"Domestic animal." Any dog, cat, equine animal, bovine animal, sheep, goat or porcine animal.

"Equine animal." Any member of the Equidae family, which includes horses, asses, mules, ponies and zebras.

"Normal agricultural operation." Normal activities, practices and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of poultry, livestock and their products in the production and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities.

"Physically limited." Having limited ambulation, including, but not limited to, a temporary or permanent impairment or condition that causes an individual to use a wheelchair or walk with difficulty or insecurity, affects sight or hearing to the extent that an individual is insecure or exposed to danger, causes faulty coordination or reduces mobility, flexibility, coordination or perceptiveness.

"Zoo animal." Any member of the class of mammalia, aves, amphibia or reptilia which is kept in a confined area by a public body or private individual for purposes of observation by the general public.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner, Janet Jones' Petition for Writ of Certiorari, with Appendix, was served on the 31st day of August, 2005, by regular first-class mail, postage prepaid to:

Bruce L. Castor, Esquire
Mary MacNeil Killinger, Esquire
Montgomery County District Attorney's Office
Courthouse – Fourth Floor
Norristown, PA 19404

SOMMAR, TRACY & SOMMAR

By: _____
Kevin J. Sommar
Attorney for Petitioner

Dated: August 31, 2005

Supreme Court, U.S.
FILED
NOV
2005
OFFICE OF THE CLERK

No. 05-303

In The

Supreme Court of the United States

JANET JONES,

Petitioner,

vs.

COMMONWEATH OF PENNSYLVANIA

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania, Philadelphia Office

PETITION FOR REHEARING OF THE OCTOBER 11, 2005 DENIAL OF PETITION FOR CERTIORARI

KEVIN J. SOMMAR, ESQUIRE
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QUESTION PRESENTED FOR REVIEW ON PETITION FOR REHEARING

I. DOES THE SUPREME COURT'S DENIAL OF THE WRIT OF CERTIORARI RENDER THE STATUTE UNDER WHICH THE PETITIONER WAS CONVICTED UNCONSTITUTIONAL?

THE SUPREME COURT'S DENIAL OF THE WRIT OF CERTIORARI RENDERS THE STATUTE UNDER WHICH THE PETITIONER WAS CONVICTED UNCONSTITUTIONAL.

Petitioner was convicted under 18 Purdon's Statute §5511 (Pennsylvania Cruelty to Animals Statute) Appendix p. 46-48. That Statute authorizes searches and seizures by the Humane Society Officers. Pennsylvania has upheld the constitutionality of that provision delegating that authority to private individuals on the basis that the search and seizure is subject to judicial review on a case by case basis. *Commonwealth of Pennsylvania v. Barnes*, 427 Pa. Super. 326, 629 A.2d 123 (1993).

This review is obtained at a suppression hearing in accordance with the Pennsylvania Rules of Criminal Procedure. Pa.R.CR.P. 581.

The Pennsylvania Rules of Criminal Procedure which govern the process by which suppression hearings are obtained and held are enacted by the Supreme Court of Pennsylvania. In accordance with the Pennsylvania Constitution the promulgation of those Rules of Criminal Procedure are exclusively within the jurisdiction of the Supreme Court of Pennsylvania. Pa. Const. Art. V §10 *Commonwealth v. Brown*, 669 A.2d 984, 447 Pa. Super. 454 (1995), appeal granted 678 A.2d 367, 544 Pa. 677, 708 A.2d 85, 440 Pa. 580, *Acuris v. Brown*, 229 F. Supp. 391 (2002) citing *Brown*.

Petitioner filed a Suppression Motion in accordance with the Pennsylvania Rules of Criminal Procedure but was denied a hearing. The basis of the denial was the imposition by the trial judge of requirement that the Motion be filed within thirty days of filing a Summary

Appeal. App. p. 21 Opinion J. Subers 2-9-04, p. 5, Pa.R.CR.P. 578, 579. This requirement is not in the Pennsylvania Rules of Criminal Procedure and has been specifically held inapplicable by the Pennsylvania Appellate Courts. *Commonwealth of Pennsylvania Department of Environmental Resources v. Blosenski,* 532 A.2d 497, 110 Pa. Comwlth. 94 (1987).

In addition the denial of the Constitutional right to a Suppression Hearing in summary offenses has been held to warrant a new trial. *Commonwealth v. Breslin,* 732 A.2d 629 (Pa. Super. 1999).

The Pennsylvania Superior Court while not adopting the erroneous decision of the Trial Judge implemented its own rule requiring that the filing of a Suppression Motion occur at some undefined time prior to trial. This rule is not only vague and uncertain but beyond the jurisdiction of the Superior Court to enact. App. p. 31 Sup. Ct. Opinion p. 5.

The reason for this is that the Pennsylvania Constitution places the enactment of Rules of Criminal Procedure exclusively within the jurisdiction of the Pennsylvania Supreme Court. Pa. Const. Art. V §10(c).

Petitioner was convicted under 18 Purdon's Statute §5511, which has been held to be constitutional only because the search and seizure by private citizens is subject to review by means of a Suppression Motion. *Commonwealth of Pennsylvania v. Barnes,* 427 Pa. Super. 326, 529 A.2d 123 (1993).

Although individuals can be deemed to waive their rights by failing to follow the applicable Rules of Criminal Procedure, Petitioner has in fact followed all of the Rules

of Criminal Procedure properly enacted in accordance with the Pennsylvania Constitution. Despite that fact, Petitioner has been denied her right to a Suppression Hearing thereby rendering the Statute under which she was convicted unconstitutional as a matter of law. *Commonwealth of Pennsylvania v. Barnes,* 427 Pa. Super. 326, 529 A.2d 123 (1993).

This issue had not been raised before in view of the fact that the normal procedural course would have been for the Supreme Court of the United States to remand the matter to the Pennsylvania Supreme Court to abide by the Pennsylvania Constitution which had been violated by the Superior Court's implementation of Rules of Criminal Procedure without constitutional authorization. Since the constitutional violation was so clear Petitioner anticipated a remand for a new trial for a Suppression Hearing that she had improperly been denied.

It is only through the Supreme Court's denial of Petitioner's Petition for Writ of Certiorari which validates the Pennsylvania Supreme Court violation of its own constitution that has effectively deprived Petitioner a right to due process by denying her a Suppression Hearing for an improper search and seizure of her property which resulted not only in a loss of her pets but the imposition of an obligation in the amount of $45,600. Accordingly since Petitioner has no other court to require a review of the improper search the statute under which she stands convicted is unconstitutional as the Petitioner has been deprived of the constitutional lynch pin upon which the statute is based. *Commonwealth of Pennsylvania v. Barnes,* 427 Pa. Super. 326, 529 A.2d 123 (1993).

Petitioner respectfully requests that the Court grant Certiorari to enable Petitioner to ensure that the constitution of the United States and Pennsylvania are followed not only by the individuals who searched and seized her property but by the Courts that are established to guard those constitutional rights of its citizens.

Respectfully submitted,

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CERTIFICATION

Kevin J. Sommar, Esquire certifies that the Petition for Rehearing is limited to substantial grounds not previously represented and is restricted to the grounds specified in Supreme Court Rule 44 and is presented in good faith and not for delay.

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Kevin J. Sommar